STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

DIANE K. SHOLBERG, as personal representative of the ESTATE OF TERRI A. SHOLBERG,

Plaintiff/Appellee,

v

ROBERT and MARILYN TRUMAN,

Defendants/Appellants,

and

DANIEL TRUMAN,

Defendant.

MSC Docket No. Qu 11-7-12 Pet 1-11-13

Docket No. 307308

Circuit Court No. 11-2711-NI

Emmet C. Johnson

OK

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

146725 APPL 3/19 B41:79

NOTICE OF HEARING

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF WHY LEAVE SHOULD BE GRANTED

The instant lawsuit arises out of a fatal vehicular accident involving Plaintiff's decedent, Terri Sholberg. Ms. Sholberg was driving on Stutsmanville Road in Harbor Springs in the early morning hours of July 13, 2010, when her vehicle struck a horse owned by Defendant Daniel Truman that apparently escaped from his farm. Defendant Daniel Truman was slowly purchasing the farm property via land contract from his brother, defendant Robert Truman and his wife, Marilyn Truman ("the Trumans" or "Defendants"). In fact, Daniel Truman deemed himself to already own the property. Although Defendants did not own or possess the horse and did not have any role with operation of the the farm, Plaintiff sued Daniel Truman and the Defendants, alleging negligence, common law nuisance, and violation of the Equine Activity Liability Act. Daniel Truman defaulted. Defendants, however, defended this lawsuit and prevailed on summary disposition. Indeed, there is simply no factual or legal tether between the incident and Defendants.

Plaintiff appealed to the Michigan Court of Appeals. During oral argument, Plaintiff confined the argument to the nuisance cause of action. Ultimately, the Michigan Court of Appeals affirmed the trial court's dismissal of the negligence and Equine Activity Liability Act claims. Defendants obviously agree with the Michigan Court of Appeals' rulings with respect to those causes of action.

Instead, Defendants respectfully contend that the Michigan Court of Appeals erred in reversing the trial court's dismissal of the nuisance cause of action. In reversing, the Michigan Court of Appeals believed that Defendants somehow knew that Daniel Truman had an issue with animals escaping from his farm. However, this ignored the plain facts— notably absent is any reference to evidence that Defendants had any knowledge of any animals escaping between 2003 and the incident. Defendants did not even know that Daniel Truman had acquired the horse that

ultimately escaped. And there is no evidence that any animal ever escaped from the specific place where the horse escaped from. In sum, it was manifest injustice from a factual standpoint, causing clear legal error, for the Michigan Court of Appeals to reverse the trial court and hold Defendants potentially liable for this incident. Accordingly, this Court should grant Defendants' application for leave to appeal pursuant to MCR 7.302(B)(5).

In addition, the Michigan Court of Appeals' interpretation of nuisance law expands the cause of action beyond what it was ever intended to accomplish. Nuisance law provides a remedy against the individual who created the nuisance. The person in possession and control of the nuisance had the ability to abate the problem. Here, Daniel Truman was the sole owner of the horse that escaped. Daniel Truman also had exclusive possession and control of the farm that the horse escaped from. In contrast, Defendants did not have ownership of the horse. Defendants also did not have possession or control of the farm that the horse escaped from. Simply put, Daniel Truman was solely responsible for the circumstances giving rise to the alleged nuisance, while Defendants were not at all responsible for the circumstances giving rise to the alleged nuisance. The Michigan Court of Appeals erroneously construed nuisance law in deeming Defendants potentially liable under a nuisance theory.

Defendants observe that the Michigan Court of Appeals' ruling unduly expands nuisance law. As applied by the Michigan Court of Appeals, any absentee owner—including a landlord—can be responsible for a nuisance solely created by the tenant on a property. Defendants respectfully contend that this extension of nuisance law is an issue of significant importance to Michigan jurisprudence. Indeed, with real property values already weak, the judiciary should not be unnecessarily and unfairly expanding the law to provide a disincentive for people to acquire investment property. This Court should grant leave pursuant to MCR 7.302(B)(3) to ensure that

Michigan law does not endorse the expansive view of nuisance law adopted by the Michigan Court of Appeals.

Defendants note that there are cases recognizing that, in order to be liable for a public nuisance, a person "must have possession or control of the land." See *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-164; 463 NW2d 450 (1990). As the *Wagner* opinion was issued on November 5, 1990, it was binding on the Court of Appeals pursuant to MCR 7.215(J)(1). Because Defendants were not in possession or control of Daniel Truman's farm (and were certainly not in possession or control of the horse that escaped from it), the Michigan Court of Appeals erroneously failed to follow its own binding precedent. This provides further support for this Court granting Defendants' application for leave to appeal pursuant to MCR 7.302(B)(5). Defendants respectfully request that this Honorable Court either grant Defendants' application for leave to appeal pursuant to either MCR 7.302(B)(3) and/or MCR 7.302(B)(5), or peremptorily reverse the Michigan Court of Appeals' decision with respect to the nuisance cause of action.

Finally, Defendants note that there are multiple cases—one very recent—recognizing that in the several liability scheme applicable to torts, a judgment against one defendant for all of the damages for an incident extinguishes the liability of all other defendants sued (or suable) for that incident. Here, at Plaintiff's urging, the trial court entered a default judgment against Defendant Daniel Truman for $5,000,000. This took place after the Trumans were dismissed. By its very nature, it reflects a 100% apportionment of damages. Indeed, they were uncontested. Plaintiff also acquiesced to no interest being added to these damages. Based on the several liability statutory scheme, the Trumans' liability—already being sued for a tort they share no responsibility for—was further precluded as a matter of law. The Michigan Court of Appeals

erred in refusing to find Plaintiff's appeal moot based on the entry of the default judgment. Accordingly, Defendants respectfully request that this Honorable Court either peremptory reverse or grant Defendants' application for leave to appeal pursuant to either MCR 7.302(B)(3) and/or MCR 7.302(B)(5) on the basis that the Michigan Court of Appeals erred in not deeming Plaintiff's appeal moot.

STATEMENT OF JURISDICTION

On November 15, 2012, the Michigan Court of Appeals issued the pertinent opinion in this matter (Opinion, Attachment 1). Defendants' timely filed motion for reconsideration or rehearing was denied on January 11, 2013 (Order, Attachment 2). This application is filed within 42 days of the latter ruling. Therefore, this application is timely pursuant to MCR 7.302(C). Defendants respectfully contend that this Court should grant their application for leave to appeal pursuant to MCR 7.302(B)(3) or MCR 7.302(B)(5), or peremptorily reverse the Court of Appeals' reversal of the trial court's order granting summary disposition to Defendants on the nuisance cause of action.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE MICHIGAN COURT OF APPEALS ERR AS A MATTER OF LAW IN REVERSING THE TRIAL COURT'S DECISION GRANTING THE TRUMANS' MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE NUISANCE CAUSE OF ACTION, WHERE THE COURT OF APPEALS ERRONEOUSLY EXPANDED NUISANCE LAW TO ALLOW MERE OWNERSHIP OF REAL PROPERTY, WITHOUT POSSESSION AND CONTROL, TO RESULT IN POTENTIAL LIABILITY FOR A NUISANCE CREATED BY PERSONAL PROPERTY OWNED, POSSESSED, AND CONTROLLED BY THE PERSON IN POSSESSION AND CONROL OF THE REAL PROPERTY?**

The Trumans answer:	Yes
The Michigan Court of Appeals answered:	No
The trial court would answer:	Yes
Plaintiff will answer:	No

II. **DID THE MICHIGAN COURT OF APPEALS ERR AS A MATTER OF LAW IN REVERSING THE TRIAL COURT'S DECISION GRANTING THE TRUMANS' MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE NUISANCE CAUSE OF ACTION, WHERE THE COURT OF APPEALS SIMPLY MISCONSTRUED THE FACTS IN DEEMING THE TRUMANS TO HAVE KNOWLEDGE OF ANY OF THE SO-CALLED 30 ANIMAL ELOPEMENTS, WHILE FURTHER ERRING IN PLACING ANY RELEVANCE ON SAME GIVEN THE HISTORICAL ELEMENTS OF A NUISANCE CAUSE OF ACTION?**

The Trumans answer:	Yes
The Michigan Court of Appeals answered:	No
The trial court would answer:	Yes
Plaintiff will answer:	No

III. **SHOULD THIS COURT INTERVENE, IF NECESSARY, TO REVISE/CLARIFY NUISANCE LAW SO THAT MERE OWNERSHIP OF PROPERTY, WITHOUT POSSESSION AND CONROL, CANNOT GIVE RISE TO NUISANCE LIABILITY UNDER MICHIGAN LAW?**

The Trumans answer:	Yes
The Michigan Court of Appeals answered:	No
The trial court would answer:	Yes
Plaintiff will answer:	No

IV. **SHOULD THIS COURT EITHER PEREMPTORILY REVERSE THE COURT OF APPEALS REVERSAL OF SUMMARY DISPOSITION FOR THE TRUMANS ON THE NUISANCE CAUSE OF ACTION OR, AT THE VERY LEAST, GRANT THE TRUMANS' APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.302(B)(3) AND/OR MCR 7.302(B)(5)?**

The Trumans answer:	Yes
The Michigan Court of Appeals answered:	N/A
The trial court would answer:	N/A
Plaintiff will answer:	No

V. **ALTERNATIVELY, SHOULD THIS COURT EITHER PEREMPTORILY REVERSE THE COURT OF APPEALS' FAILURE TO AFFIRM THE TRIAL COURT ON THE "RIGHT RESULT, WRONG REASON" BASIS THAT PLAINTIFF'S VOLUNTARY DECISION TO TAKE A DEFAULT JUDGMENT AGAINST DEFENDANT DANIEL TRUMAN RENDERS THE APPEAL MOOT?**

The Trumans answer:	Yes
The Michigan Court of Appeals answered:	No
The trial court would answer:	N/A
Plaintiff will answer:	No

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

The instant lawsuit arises out of a fatal vehicular accident involving Plaintiff's decedent, Terri Sholberg. Ms. Sholberg was driving on Stutsmanville Road in Harbor Springs in the early morning hours of July 13, 2010, when her vehicle struck a horse owned by Defendant Daniel Truman that apparently escaped from his farm. Defendant Daniel Truman was slowly purchasing the farm property via land contract from his brother, defendant Robert Truman and his wife, Marilyn Truman ("the Trumans" or "Defendants"). In fact, Daniel Truman deemed himself to already own the property. Although Defendants did not own or possess the horse and did not have any role with operation of the farm, Plaintiff sued Daniel Truman and the Defendants, alleging negligence, common law nuisance, and violation of the Equine Activity Liability Act. Daniel Truman defaulted. Defendants, however, defended this lawsuit and prevailed on summary disposition. Indeed, there is simply no factual or legal tether between the incident and Defendants.

The Michigan Court of Appeals properly affirmed the dismissal of the negligence and Equine Activity Liability Act claims. However, as will be explained below, the Michigan Court of Appeals erred as a matter of fact and law in reversing the trial court's dismissal of the nuisance cause of action. Defendants respectfully request that this Honorable Court either grant Defendants' application for leave to appeal pursuant to either MCR 7.302(B)(3) and/or MCR 7.302(B)(5), or peremptorily reverse the Michigan Court of Appeals' decision with respect to the nuisance cause of action. Alternatively, this Court should peremptorily reverse or grant leave under MCR 7.302(B)(3) and/or MCR 7.302(B)(5) because Plaintiff's appeal is moot, given the

trial court finding that Defendant Daniel Truman was solely responsible for a $5,000,000 judgment reflecting all of Plaintiff's damages for this incident.

Statement of Facts

Plaintiff's decedent, Terri A. Sholberg ("Plaintiff") died in an automobile accident on July 13, 2010 at approximately 5 a.m. when her vehicle struck a horse (Appendix A,[1] Complaint and First Amended Complaint). Defendant Daniel Truman—who is not an appellant—has lived at 5151 Stutsmanville Road ("the property") for nearly his entire life (Appendix B, Deposition of Daniel Truman at 7). In contrast, for the past 14 years, the appellants, Defendants Robert and Marilyn Truman ("the Trumans"), have resided at 630 Cetes Road, in Harbor Springs, Michigan (Appendix C, Deposition of Robert Truman, at 8).

The Trumans are only in this lawsuit because they helped out Defendant Daniel Truman. Defendant Robert and Daniel Truman's mother sold the property to Daniel Truman and his ex-wife, Linda (Appendix B, 59). When Daniel and Linda Truman divorced in December 1989, Linda Truman signed a deed to the property to Robert and Marilyn Truman (*Id.*). The divorce decree required Daniel Truman to pay off his wife's equity interest in the property (*Id.* at 10). In order to have the cash to do so, Daniel Truman borrowed money from his brother, Robert Truman (*Id.*). Daniel Truman believed there was paperwork to memorialize this agreement (*Id.* at 11). Additionally, he understood that the property would be in his brother Robert's name until the debt was paid (*Id.* at 12). Under the agreement, Daniel Truman was to pay $300 a month

[1] This Court's clerk's office has requested that appellate attorneys cease submitting appendices in support of applications for leave to appeal. Defendant will adhere to that request. For ease of reference, however, this brief will note the appendices to Defendant's Brief on Appeal with the Michigan Court of Appeals. All references to "Appendix" refer to the appendices filed in the Michigan Court of Appeals. Defendant will refer to the exhibits to this brief, if any, as Attachments (i.e. Attachment 1).

towards the purchase of the land (*Id.* at 17). He was able make these payments for a couple of years (*Id.*). Due to a lack of work, he stopped making regular payments and only made occasional payments (*Id.*) Daniel Truman, however, did keep an itemized list of work that he has done for Robert and Marilyn Truman over the years, which he considered as payment on the property (*Id*[2]. at 17.). Daniel Truman did not have cash, but wanted to continue buying the property (*Id* at 18). To date, Daniel Truman repaid approximately $6,000 in cash (and apparently other consideration) towards the $15,000 he owes his brother Robert on the land contract (Appendix C, 46).

Robert Truman expected Daniel Truman to repay him the $15,000, and had a land contract drawn up (Appendix C, 50). However, he could never get Daniel to sign it (*Id.* at 50). Robert Truman never made any improvements or changes to the property (*Id.*) Nor did he have any say over whom Daniel Truman invited to the property or the activities Daniel Truman conducted on the property (*Id.*). Daniel Truman also pays the property taxes (Appendix B, 78). In further evidence of the intended land contract, Robert and Marilyn assigned their interest in the contract to NBD Petoskey, N.A. on December 5, 1989. See Appendix B, Exhibit 4 (Assignment of Land Contract as Security (Vendor's Interest)).

Daniel Truman has worked around horses most of his life (*Id.* at 16). He uses horses for plowing fields, farming, and skidding timber from the woods (*Id* at 13). Daniel Truman owned the horse that was involved in the accident (*Id.* at 13-14). He traded fourteen feeder pigs to an acquaintance in exchange for the horse ten days prior to this accident (*Id.* at 14). He had "known" the horse for four years prior to the purchase, and he further confirmed that the horse was well-trained and was a tame, "gentle giant" (*Id.* at 15-16).

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[2] Included in Appendix B is Daniel Truman's itemized list as deposition exhibits 2 and 3.

Importantly, as a new horse acquisition, the horse was temporarily boarded in a corral on the Stutsmanville property (*Id.*). During the horse's residence on the premises, nothing alerted Daniel Truman that the horse was trying to escape, was acting up, or was in any way becoming skittish (*Id.*)

Daniel Truman never reported to the Trumans about what was happening on the premises, much less what animals that he was keeping (*Id.* at 20). Daniel Truman testified that the Trumans never controlled the property or were responsible for animals on the property (*Id.* at 20-21). Indeed, he deemed himself to own the property.

Moreover, Daniel Truman and the Trumans were estranged; the Trumans have had little contact with Daniel Truman and the property in the past decade. Prior to the accident, Robert Truman was last on the property eight or nine years ago (Appendix C, 30). The Trumans' residence is seven miles away from the property, and Robert testified that he had only driven by the property twice in the past eight or nine years (*Id.* at 35). Defendant Daniel Truman's recollection was that it was five or six years before the incident (Daniel Truman dep, 20). Additionally, Robert Truman has spent no time with his brother over the past ten years (*Id.* at 45). He did not get information or reports about Daniel Truman or the property (*Id.* at 51). Robert Truman also has never gone out and inspected the property, nor has he done anything to make sure Daniel Truman is properly managing the property because "it's [Daniel's] farm." (*Id.* at 52).

A number of Daniel Truman's neighbors were deposed in this action. Their testimony reveals that there is simply no basis to impute knowledge regarding the "eloping" animals to the

Trumans.[3] For example, Daniel Truman's nearest neighbors are William and Ann Brecheisen. William Brecheisen testified that he never spoke with the Trumans about any issues with Daniel Truman's animals (Appendix D, 17). Ann Brecheisen similarly testified that her only conversations with the Trumans regarding the Stutsmanville property was after the incident. (Appendix E, 11). So she never spoke to the Trumans *before* the incident.

Janice Hartman had called Daniel Truman or his neighbor, Mr. Perrault, a few times about the animals (Appendix F, Deposition of Janice Hartman at 13). Similarly, she made a few complaints to 9-1-1 about animals (*Id.* at 15). However, she does not state that she ever called the Trumans.

Becky Sue Major testified that she only knows the Trumans by name, and could not pick them out of a crowd (Appendix G, Deposition of Becky Sue Major at 20). She never made any reports about the management or operation of the Stutsmanville property to the Trumans. (*Id.* at 22). Becky's brother Jim Major testified that he had not seen any loose animals around the Stutsmanville property in over 9 years (Appendix H, Deposition of James Major at 9). He never made any official reports about animals being loose (*Id.* at 8). The only animals he ever observed were fowl and perhaps a dog (*Id.*). Jim and Becky's father, Al Major, testified that he knew the Trumans well, but had not spoken with them about any animals on the Stutsmanville property (Appendix I, Deposition of Alfred Major at 9). He only made reports to Daniel Truman and to the authorities regarding animals on the Stutsmanville property (*Id.* at 8-10). So none of the Majors ever reported an issue to the Trumans.

Edward Jelinek did not even know Robert or Marilyn Truman (Appendix J, Deposition of Edward Jelinek at 12). Mr. Jelinek also does not know James Major, Becky Sue Major, Janice

[3] In Plaintiff's response to the Trumans' Motion for Summary Disposition and in their brief on appeal, they refer to various police reports and other documents produced on a CD. Layers of inadmissible hearsay are present with

Hartman, or Mike Ruggles, the other residents who apparently made formal complaints about animals loose at the Stutsmanville property (*Id.* at 13). He testified that he observed animals on Daniel Truman's premises "one or two times." (*Id.* at 8).

Stephen Jaquith lives three to four miles away from the property. He testified that he could not think of any instances of loose animals in the past five years (Appendix L, deposition of Stephen Jaquith at 9). As he thought the property was owned by Daniel Truman and did not know the Trumans, he would not have had reason to contact them (*Id.* at 9-10). Neighbor Richard Cobb testified that he observed animals near the Stutsmanville property on only one occasion in the past 20 years (Appendix M, Richard Cobb Deposition at 7-8). He did not testify about calling the Trumans to report an animal elopement issue. In sum, not a single neighbor testified that they contacted the Trumans to report an animal elopement issue.

Daniel Truman's girlfriend Carol Gratsch was deposed in this matter. She testified as follows regarding the horse's temperament:

> Well, he was a very calm, very gentle horse. Just a couple days before this happened, I had -- a friend brought a -- a three-year-old child, and that child could stick his fingers in its nose, he wasn't anxious, he wasn't, you know, just pacing or trying to get out of his pen. He -- he was just very approachable and -- and very much a -- a sweetheart. [*Id.* at 15-16].

This is consistent with Daniel Truman's description of the horse.

Jack Balchik, has served as the animal control officer for Emmet County since 1983, is not familiar with Robert and Marilyn, and never attempted to contact Robert or Marilyn regarding any complaint about animals at the 5151 Stutsmanville Road property (Appendix N, Deposition of Jack Balchik at 63-64). Instead, he testified that the person who possesses, controls or cares for the animals would be responsible for them (*Id*).

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these reports and they may not be considered in assessing the Trumans' motion. MCR 2.116(G)(6) and MRE 802.

Marilyn Truman was also deposed in this matter. (Appendix O, deposition of Marilyn. Truman). Marilyn Truman specifically testified that she was aware of two or three complaints regarding animal elopements, but that all such issues occurred before 2001 (M. Truman deposition, 22-25). Moreover, these few calls were in the nature of someone looking for Daniel Truman (*Id.* at 24). She explained that she recalled the date because it was before her husband opened up the business Brakes by the Bay (*Id.* at 25).

Robert Truman was only asked whether he was aware of the elopements after 2003 (R. Truman deposition, 51-52). He specifically testified that he was not aware of the elopements (*Id*). Plaintiff did not inquire whether he was aware of the two or three elopements brought to Marilyn Truman's attention before 2001. Regardless, he was not aware of post-2003 elopements. Thus, the undisputed evidence is that the Trumans were not aware—and were never made aware—of any animal elopements between (at least) 2003 and the incident in 2010.

A default was taken as to Daniel Truman. The Trumans obtained counsel and defended the matter. Discovery in this matter was intense with the deposition testimony of nearly 20 witnesses being taken. Following discovery, the Trumans sought summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). (Appendix P, the Trumans' Motion for Summary Disposition without exhibits). Plaintiff responded. (Appendix Q, Plaintiff's Response) The trial court granted the Trumans' motion and held that Plaintiff had no cause of action under the exculpatory Equine Activity Liability Act, and had insufficient evidence to proceed against the Trumans for negligence or nuisance. (Appendix R, Motion for Summary Disposition Hearing Transcript).

As to the Equine Activity Liability Act, the Court held that the Act did not apply to the present circumstances where the Trumans did not provide any equipment or tack in connection

with horses and did not supply a horse. (*Id.* at 14). Similarly, the court concluded that Terri Sholberg was not engaged in an equine activity on the property. (*Id.*) The trial court ultimately concluded that the Equine Activity Liability Act did not create a new cause of action for negligence. (*Id.* at 15). In granting summary disposition in favor of the Trumans on the negligence count, the trial court appropriately concluded that they owed no duty where there was "no evidence to show that they actively managed, supervised, maintained, possessed or controlled the subject property." (*Id.*) Rather, the court appropriately concluded that Daniel Truman was at all times in possession of the subject premises. (*Id.*) Finally, with regard to Plaintiff's nuisance claim, the trial court concluded that nuisance duties could only be owed by the premises possessor. As the Trumans were never in possession of the subject premises, they were not liable for any public or private nuisance. (*Id.* at 16.) An order dismissing Plaintiff's claims against the Trumans was entered. (Appendix S, Order Granting the Trumans' Motion for Summary Disposition).

The Trumans sought offer of judgment sanctions as they had made a $5,000.00 offer of judgment at the outset of this litigation. (Appendix T, Trumans' Motion for Offer of Judgment Sanctions with Exhibits). Plaintiff field a response arguing that the Court should deny the Trumans' request in the "interest of justice" as she felt the Trumans' offer was not in good faith and constituted gamesmanship. (Appendix U, Plaintiff's Response to Motion for Offer of Judgment Sanctions). The trial court heard oral arguments and ultimately held that the "interest of justice" exception in MCR 2.405(D)(3) applied and denied the Trumans' motion. (Appendix V, Transcript on Motion for Offer of Judgment Sanctions and Entry of Default, Appendix W, Order Denying Offer of Judgment Sanctions).

At the same hearing, the trial court took the testimony of Diane K. Sholberg to determine damages and enter a default judgment against Daniel Truman. (*Id.*) Ultimately, the court entered a judgment for $5,000,000 against Daniel Truman (*Id.* at 20-23; Appendix X, Judgment).

Plaintiff filed an appeal as of right with the Michigan Court of Appeals. Although Plaintiff challenged the dismissal of all three causes of action on appeal, Plaintiff expressly confined the oral argument to the nuisance cause of action. Not surprisingly, the Michigan Court of Appeals affirmed the trial court's dismissal of the negligence and Equine Activity Liability Act claims (Opinion, Attachment 1). The Trumans need not discuss these proper rulings.

Instead, the relevant portion of the Michigan Court of Appeals decision is the reversal of the trial court's dismissal of Plaintiff's nuisance claim (Attachment 1, 5-6). The Court of Appeals first identified that Plaintiff had pleaded a "public nuisance" claim (Attachment 1, 5). The Court of Appeals further opined:

> Sholberg provided evidence to the trial court of at least 30 instances of animal elopement from the Property between 2003 and 2010, which allegedly created hazards on Stutsmanville Road. There was evidence that the Trumans were aware of the issue regarding animal elopement and that complaints had been lodged. And there was no evidence presented that the Trumans did anything to address the problem. [Attachment 1, 6.]

Thus, the Michigan Court of Appeals reversed the trial court.

Defendants filed a motion for reconsideration or rehearing with the Michigan Court of Appeals, recognizing that the above quoted language was erroneous (Defendants' Motion for Reconsideration of Rehearing, Attachment 3). Contrary to what the Michigan Court of Appeals found, there was absolutely no evidence that Defendants were aware of any post-2003 animal elopement (Attachment 3, 3-5). Indeed, the record only supported an inference that Defendants were aware of a few animal elopement issues prior to 2001. *Id.* Thus, the instant matter is a unique case where the Michigan Court of Appeals simply missed the facts.

From a legal standpoint, Defendants further noted that the Court had misconstrued the "nuisance" cause of action to allow a recovery against a party that did not create the nuisance and did not have possession or control of the land from which the nuisance arose (Attachment 3, 5-8). Further, the instant matter is even more inappropriate for nuisance liability against Defendants because it was Daniel Truman that exclusively owned, possessed, and controlled the actual nuisance—the horse (Attachment 3, 8-9). After all, it was not the real property that caused the nuisance, it was the personal property Daniel Truman brought onto the real property (without Defendants' knowledge). In fact, as a new horse, Daniel Truman was temporarily keeping it segregated from the other horses in a smaller, segregated corral (Daniel Truman dep, 15-16; Attachment 3, 8-9). Importantly, of the so-called 30 incidents noted in Plaintiff's Brief on Appeal, only five involved horses and there is no evidence of any other horse escaping from the segregated corral[4] (Attachment 3, 8-9). Defendant specifically argued that Michigan law either does not support a nuisance claim against Defendants, or should be revised to confirm that it does not support a nuisance claim, under these circumstances (Attachment 3, 8-10).

Plaintiff filed a response to Defendants' motion for reconsideration, essentially contending that Defendants' ownership of property should allow them to be held responsible for the personal property nuisance created by Daniel Truman. See generally Plaintiff's response to Defendants' motion for reconsideration. The Court of Appeals denied Defendants' motion in an order without analysis (Attachment 2).

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[4] See generally Plaintiff's Brief on Appeal to the Michigan Court of Appeals. In fact, of the five horse escapes, only one incident involved a single horse and that occurred in 2004—more than five full years before this incident. Even it is assumed that the horse escaped from Daniel Truman, and then assumed that the horse escaped from the same location as the horse in this incident, it is unfathomable that a horse escape from the corral was an ongoing problem with more than five years between the two incidents.

This appeal follows. As will be explained below, Defendants respectfully contend that this Court should grant their application for leave to appeal pursuant to MCR 7.302(B)(3) or MCR 7.302(B)(5), or peremptorily reverse the Court of Appeals' reversal of the trial court's order granting summary disposition to Defendants on the nuisance cause of action.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10). . A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Allstate Ins Co v State of Michigan, Dep't of Management & Budget*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors*, 469 Mich 177, 182; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of the doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

Ordinarily the party moving for summary disposition pursuant to MCR 2.116(C)(10) bears the initial burden of supporting its position with affidavits, depositions, and other evidence. *Auto Club Ins Ass'n v State Automobile Mutual Ins Co*, 258 Mich App 328, 332-333; 671 NW2d 132 (2003). The burden then shifts to the party opposing the motion to demonstrate through admissible evidentiary materials that a question of material fact exists. *Id.*

ARGUMENT

I. THE MICHIGAN COURT OF APPEALS ERRED AS A MATTER OF LAW IN REVERSING THE TRIAL COURT'S DECISION GRANTING THE TRUMANS' MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE NUISANCE CAUSE OF ACTION, WHERE THE COURT OF APPEALS ERRONEOUSLY EXPANDED NUISANCE LAW TO ALLOW MERE OWNERSHIP OF REAL PROPERTY, WITHOUT POSSESSION AND CONTROL, TO RESULT IN POTENTIAL LIABILITY FOR A NUISANCE CREATED BY PERSONAL PROPERTY OWNED, POSSESSED, AND CONTROLLED BY THE PERSON IN POSSESSION AND CONROL OF THE REAL PROPERTY.

A. Introduction

The Trumans acknowledge that the instant matter arises out of the unfortunate passing of Plaintiff's decedent. The Trumans further acknowledge that, without the default, Plaintiff might have a compelling factual cause of action against Defendant Daniel Truman for allowing his horse to escape from his farm. Of course, with the default judgment, Plaintiff need not prove its case against him.

However, Plaintiff's case against the Trumans is simply the pursuit of another (or deeper) pocket. There is no dispute that the Trumans had not even been on the property in several years before the incident. There is no dispute that the Trumans did not own the horse in question. There is no dispute that the Trumans did not even know that the horse existed. There is no dispute that the Trumans did not know how Defendant Daniel Truman was boarding this particular horse.

Instead, Plaintiff's entire case is based on prior reports of different animals escaping from different parts of the farm. Even as to these alleged events, no witness testified that he or she notified the Trumans regarding any prior escape of an animal from Daniel Truman's farm. The only evidence that the Trumans had any knowledge of any animal ever escaping from the property was Marilyn Truman's testimony that she received phone calls before 2001 with people

looking for Defendant Daniel Truman. The Trumans did not testify that they had any knowledge regarding any of the alleged animal escapes after 2001.

On these facts, no reasonable jury could ever conclude that the Trumans are responsible for the unique circumstances that led to the escape of the horse on this occasion. The trial court recognized as much when it dismissed the nuisance cause of action against the Trumans—who did not create the nuisance, were not in possession/control of the real property, and were not the owners of the personal property that caused the nuisance. Any other conclusion converts nuisance law into one of strict liability. Michigan law has not previously indicated that nuisance law is a strict liability tort. Accordingly, it was legal error for the Michigan Court of Appeals to reverse the trial court's dismissal of the nuisance cause of action.

Even if this Court was inclined to believe that, under current nuisance law, an owner of real property can be liable for a nuisance based solely on the personal property of the party in possession and control of the real property, this Court must intervene to clarify that nuisance law cannot allow such a recovery. Instead, the person responsible for the nuisance should be sued for the nuisance. This is a basic tenet of all tort law. And it is important for the jurisprudence of this state that the law be clarified to ensure that other property owners are not haled into court based on their title ownership of real property, simply because a tenant or relative creates a nuisance with personal property on their real property. Consequently, this Court must—at the very least—grant leave to further explore the proper scope of nuisance law.

B. Plaintiff's Nuisance Claim Fails as a Matter of Law

Plaintiff's nuisance claim against the Trumans is set forth in Count IV of her First Amended Complaint (Appendix A). As a preliminary matter, Plaintiff does not expressly plead whether she is alleging private nuisance or public nuisance; however, as there is no claim that the

decedent was entitled to private use and enjoyment of Stutsmanville Road, no private nuisance claim could possibly be present. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-303; 487 NW2d 715 (1992) citing 4 Restatement Torts, 2d, § 821D. Therefore, the instant matter can only sound in public nuisance. This is the theory considered and applied by the Michigan Court of Appeals. As will be explained below, there are numerous reasons why Plaintiff's nuisance claim against the Trumans fails as a matter of law.

a. There Was No Conduct By The Trumans

A public nuisance is only actionable in limited circumstances. The Court in *Dinger v Department of Natural Resources*, 191 Mich App 630; 479 NW2d 353 (1991), explained as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or,
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. [*Id.* at 636, emphasis added.]

Consequently, a public nuisance always requires some sort of affirmative "conduct" by the defendant.

This is consistent with *Merritt v Nickelsen*, 80 Mich App 663; 264 NW2d 89 (1978), aff'd 407 Mich 544; 287 NW2d 178 (1980), which held as follows:

> "[The] rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land * * * for the obvious reason that the man in possession is in a position of control,

> and normally best able to prevent any harm to others." Prosser, Law of Torts (3d ed), § 57, p 358. (Footnote omitted.)
>
> "Possession" differs from the "right to possession" and "ownership" because of the concept of control. Possession is the detention and control of anything which may be the subject of property, for one's use and enjoyment. Blacks Law Dictionary (4th ed), p 1325. The mere "right to possession" does not necessarily entail the control inherent in the nature of "possession."
>
> It has been recognized in this state that control and possession are the determinative factors in the imposition of liability.
>
> "It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore rests primarily upon him who has control and possession." *Dombrowski v Gorecki*, 291 Mich 678, 681; 289 NW 293 (1939), citing *Bannigan v Woodbury*, 158 Mich 206; 122 NW 531 (1909).
>
> * * *
>
> "It is a general principle of tort law that a person is liable only as he participates in an activity giving rise to a tort. Mere co-ownership of land standing alone will not subject a person to liability for torts committed in the land by the other co-owners." *Musser v Loon Lake Shores Association, Inc*, 384 Mich 616, 622; 186 NW2d 563 (1971). [*Id.* at 666-668.]

To be sure, the *Merritt* Court appeared to be discussing a cause of action more akin to premises liability than nuisance. However, the principles are just as relevant in the context of a nuisance tort—mere property ownership cannot give rise to a tort. Instead, a person must contribute somehow to a tort in order to be liable for same.

Here, Plaintiff cannot allege or prove any conduct by the Trumans in causing the alleged nuisance. Instead, Plaintiff's theory is based on pure nonfeasance. Under Michigan law, action has long been required to make a nuisance claim. See e.g. *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570, 573; 316 NW2d 259 (1982), where the Court adopted the reasoning of *Merriam v McConnell*, 31 Ill App 2d 241, 246; 175 NE2d 293 (1961) and held that "[i]n order to create a legal nuisance, **the act of man must have contributed to its existence**. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and

expense" (emphasis supplied). Plaintiff does not, because she cannot, identify any affirmative actions or conduct by the Trumans that contributed to Plaintiff's injuries. Accordingly, the Trumans were plainly entitled to summary disposition.

b. The Trial Court Properly Granted the Trumans' Motion for Summary Disposition Because Control, Rather than Ownership, is Required to Assert a Nuisance Claim

In granting the Trumans' motion for summary disposition with respect to the nuisance cause of action, the trial court opined that nuisance duties could only be owed by the premises possessor. As the Trumans were never in control of the subject premises, they were not liable for a nuisance. The trial court was correct in so ruling.

In *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-164; 463 NW2d 450 (1990) (emphasis supplied), citing 4 Restatement Torts, 2d, § 838, p 157, the Michigan Court of Appeals opined as follows:

> The **possessor** of land upon which the third person conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Thus, the *Wagner* panel recognized that there are circumstances where a nuisance created by another can lead to liability—but this liability is limited to the *possessor* of land. But, in order to be liable for a public nuisance, a person "must have possession or control of the land." [5] *Id.* citing *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989). The Trumans note that the *Wagner* decision was issued on November 5, 1990, and was binding on the Michigan Court of Appeals pursuant to MCR 7.215(J)(1).

Here, there is no evidence that the Trumans were in possession of the real property. In fact, Plaintiff's appellate briefing noted that the claim against the Trumans was based on mere

passive ownership, rather than possession (see Plaintiff's brief, 22). The evidence is uncontroverted on this issue. Robert Truman testified that he had not been to the premises in nearly a decade and he only drove by it twice in eight years (Appendix C, 30, 35). Defendant Daniel Truman's recollection was that it was five or six years before the incident (Daniel Truman dep, 20). Additionally, Robert Truman has spent no time with his brother over the past ten years (*Id.* at 45). He did not get information or reports about Daniel Truman or the property (*Id.* at 51). Robert Truman also has never gone out and inspected the property, nor has he done anything to make sure Daniel Truman is properly managing the property because "it's [Daniel's] farm." (*Id.* at 52). Not only were the Trumans not the possessors of the land, it had been many years since they even visited the land. Regardless, under *Wagner*, which was binding on the Michigan Court of Appeals, the absence of possession precluded a nuisance claim against the Trumans.

Instead of following *Wagner*, the Michigan Court of Appeals accepted Plaintiff's invitation to follow the later-issued *Cloverleaf Car Co v Wykstra Oil Co*, 213 Mich App 186; 540 NW2d 297 (1995)(COA Opinion, 5). In *Cloverleaf*, as part of a decision finding the defendant not liable for nuisance, the Michigan Court of Appeals opined as follows:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise. *Gelman Sciencess, Inc* v *Dow Chemical Co,* 202 Mich. App. 250, 252; 508 N.W.2d 142 (1993).

Although the *Cloverleaf* panel did not find liability, it did choose to recite the examples of nuisance listed in the *Gelman Sciences* decision. Importantly, the *Cloverleaf* decision did not involve holding an owner liable for a nuisance created by another on the land.

The *Gelman Sciences* decision, in turn, borrowed its recitation of the examples of a nuisance from a 1982 Court of Appeals decision: "Generally, nuisance liability may be imposed where (1) the defendant has created the nuisance, (2) the defendant owned or controlled the property from which the nuisance arose, or (3) the defendant employed another to do work that he knew was likely to create a nuisance. *Radloff v Michigan*, 116 Mich App 745, 758; 323 NW2d 541 (1982)." *Gelman Sciences, supra* at 252. Of course, after reciting those examples, the *Gelman Sciences* panel immediately cited *Detroit Bd of Ed v Celotex (On Remand)*, 196 Mich App 694, 712; 493 NW2d 513 (1992), for the proposition that a commercial transaction requires "control of the nuisance at the time of injury." *Gelman Sciences*, *supra* at 252. Because the defendant did not own or possess the personal property that was the alleged nuisance, a nuisance claim was not available to the plaintiff. *Id.* Instead, the plaintiff was required to proceed under a product liability, negligence, or breach of warranty theory. *Id.* So, regardless of the recitation of elements, the *Gelman Sciences* decision does not support a conclusion that the owner of property can be deemed responsible for a nuisance created by another on the property.

The *Celotex* decision is also instructive. In *Celotex*, the plaintiff similarly tried to argue that the creation of asbestos-containing products allowed for liability for nuisance (rather than merely product liability claims). *Celotex*, *supra* at 709-710. The Michigan Court of Appeals disagreed, noting that creation of a product does not give rise to nuisance liability because there is no control over the product. *Id.* The *Celotex* Court further recognized as follows:

> In lieu of a rule of general application, a functional test has been applied to determine whether the defendant "uses" property in a manner sufficient to subject him to liability for nuisance. A critical factor in this test is whether the defendant exercises control over the property that is the source of the nuisance. Thus, liability of a possessor of land is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking

> reasonable measures to remedy conditions on it that are a source of harm to others. [*Id.* at 711 n 8, quoting 58 Am Jur 2d, Nuisances, § 123, p 764.]

In any event, the absence of control over the product in *Celotex* was among the reasons that liability was not imposed against the defendant for nuisance.

Here, of course, the Trumans were not in possession and control of the land. The evidence is uncontroverted that Defendant Daniel Truman was in exclusive possession and control of the land. He certainly was at the time of the incident. Defendant Daniel Truman was also in exclusive possession and control of the horse that was the true nuisance. After all, the farm itself did not interfere with Plaintiff's decedent's use of the highway. Rather, it was the escaping horse that did the pertinent damage. While Plaintiff cannot sue the horse, Plaintiff can and did sue Defendant Daniel Truman.

Indeed, property ownership is not required to be liable for a nuisance; rather it is the control over the nuisance at the time it occurs:

> Property ownership is generally not a prerequisite to nuisance liability. Rather, the test of liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise. For one to be held liable for a nuisance, the person must control or manage or otherwise have some relationship to the offensive instrumentality or behavior that would allow the law to say that the defendant must stop causing it and/or pay damages for it. Thus, dominion and control over the property causing the harm is sufficient to establish nuisance liability.
>
> Observation: A defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs. [58 Am Jur 2d, Nuisances, § 91.]

Thus, Plaintiff properly sued Defendant Daniel Truman. He was in control of both the horse and the farm at the time the damage to Plaintiff occurred. Even if Defendant Daniel Truman is incorrect in his belief that he owned the farm, he is still a viable target for a nuisance claim. Moreover, as the sole person with both exclusive dominion and control over the land and horse,

it was error for the Court of Appeals to reverse the trial court's conclusion that the Trumans were entitled to summary disposition on the nuisance cause of action.

As noted above, the *Celotex*, *Cloverleaf*, and *Gelman Sciences* panels did not rule that mere ownership, in the absence of possession and control, can support a nuisance claim against the owner. Although these cases recited "the elements," such a recitation of the elements was obiter dictum. Instead, the true controlling law on this issue was the binding decision in *Wagner*, which the Michigan Court of Appeals should have relied on to conclude that the Trumans were entitled to summary disposition.

Even the non-binding decisions of the Michigan Court of Appeals (i.e. the pre-November 1990 ruling) do not support liability against the Trumans. As noted above, *Cloverleaf* cited *Gelman Sciences*. *Gelman Sciences,* in turn, cited a pre-November 1990 decision, *Radloff v Michigan*, 116 Mich App 745, 758; 323 NW2d 541 (1982). In *Radloff*, the Michigan Court of Appeals recited the examples of nuisance as allowing for liability based on "ownership or control" of the property. *Id.* at 758. However, in *Radloff*, the trial court concluded after a bench trial that the defendant both owned and controlled the property—a finding that, based on the evidence, was not clearly erroneous. *Id.* at 754, 759. In fact, the trial court concluded that the defendant was in "complete possession and control" of the area. *Id.* at 754. In addition, the *Radloff* decision distinguished the *Merritt* decision because the defendant did *more than merely own* the land at issue. *Id.* at 754-757. So, once again, *Radloff* does not support a conclusion that mere ownership of land, without also having possession and control of the land, can support a nuisance claim.

The *Radloff* Court's recitation of the examples of a nuisance claim cited *Stemen v Coffman*, 92 Mich App 595, 597-598; 285 NW2d 305 (1979). The basis of these elements arises from this language in *Stemen*:

> "Liability for damage caused by a nuisance turns upon whether the defendant was in control, either through ownership or otherwise." 58 Am Jur 2d, Nuisances, § 49, p 616. We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance. The city's relationship with the property alleged to constitute a nuisance in this case falls under none of these headings; indeed, it is far more attenuated. To hold the city liable under the "nuisance exception" in this case would stretch the concept of liability for nuisance beyond all recognition. [*Id.* at 598.]

Unfortunately, the Court of Appeals did not provide any citations for the proposition that a nuisance can be based on ownership of the property alone. It is rather obvious that ownership and control of property *usually* run together. The purpose of having the elements read "owned or controlled," rather than "owned and controlled," is that ownership is <u>not</u> required for nuisance liability. Instead, as recognized by all of these decisions, as well as the treatises cited above, it is <u>control</u> over the land/nuisance that gives rise to potential liability.

Here, as noted above repeatedly, the Trumans did not control the land at issue. There is no evidence to suggest otherwise. Instead, Defendant Daniel Truman controlled the land. Regardless of ownership of the land, it was Defendant Daniel Truman's responsibility to keep his horse on the land and out of the road. Whether based on the land or the horse, only Defendant Daniel Truman can be held liable for nuisance. Accordingly, the trial court correctly ruled that the Trumans were entitled to summary disposition on the nuisance cause of action.

c. The Court of Appeals' Consideration of Past Alleged Events on the Property Gave Undue Consideration to a "Red Herring" and Was Factually Incorrect

In reversing the trial court's decision to grant summary disposition to the Trumans, the Michigan Court of Appeals opined as follows:

> Sholberg provided evidence to the trial court of at least 30 instances of animal elopement from the Property between 2003 and 2010, which allegedly created hazards on Stutsmanville Road. There was evidence that the Trumans were aware of the issue regarding animal elopement and that complaints had been lodged. And there was no evidence presented that the Trumans did anything to address the problem. [Attachment 1, 6.]

As will be explained below, the Michigan Court of Appeals simply erred factually in ruling that the "Trumans were aware of the issue." Regardless, being aware of an issue is irrelevant to being in a position of possession or control to prevent the nuisance. Accordingly, the Michigan Court of Appeals erred in allowing the alleged prior incidents to prevent it from affirming the trial court's dismissal of the nuisance cause of action.

As a preliminary matter, the suggestion that there were "30 instances of animal elopement from the Property" is very misleading. The animal control officer for Emmet County, Jack Balchik, acknowledged that not every call of an animal elopement near Defendant Daniel Truman's farm was actually related to one of Defendant Daniel Truman's animals (Appendix N, 68). Indeed, Defendant Daniel Truman provided several examples of incidents where people thought it was his animals, but it was not (see Daniel Truman dep, 75-76). So it is very misleading for Plaintiff to argue, or for any court to accept, that all of these instances of animal elopement were truly related to Defendant Daniel Truman.

But where the Michigan Court of Appeals really erred was suggesting that the Trumans had any knowledge whatsoever of these so-called "30 instances of animal elopement from the

Property." Quite the contrary, the evidence on this issue revealed that the Trumans had no knowledge of these 30 instances of animal elopement:

- Robert Truman expressly stated that he was not aware of any instances of animal elopement (Robert Truman dep, 51-52).
- Marilyn Truman specifically testified that she was aware of two or three complaints regarding animal elopements, but that all such issues occurred before 2001 (M. Truman deposition, 22-25). Moreover, these few calls were in the nature of someone looking for Daniel Truman (*Id.* at 24). She explained that she recalled the date because it was before her husband opened up the business Brakes by the Bay (*Id.* at 25).

Thus, neither of the Trumans was aware of any instances of animal elopement—whether fairly attributable to Defendant Daniel Truman or not—occurring after 2003. In sum, there is simply no evidence to support the Michigan Court of Appeals conclusion that the Trumans were aware of any ongoing issue regarding animal elopement.

If Plaintiff did not believe the Trumans, she was free to introduce evidence of persons who reported the incident to the Trumans. However, although nearly 20 witnesses were deposed in this matter, no witness testified that they contacted the Trumans to report even one instance of animal elopement. There is simply no evidence that anyone ever reported the instances of animal elopement to either of the Trumans after 2000. Moreover, inasmuch as the Trumans and Defendant Daniel Truman testified regarding their estrangement—it makes complete sense that the Trumans did not have any knowledge regarding the animal elopements. The Trumans were simply unaware of the animal elopements.[6]

[6] Even worse, having learned of a few instances of animal elopement before 2001, but not being privy to the instances of animal elopement occurring after 2001, the Trumans would have been led to believe that Defendant

Moreover, Jack Balchik, the Emmet County animal control officer since 1983, testified that he was not even familiar with Robert and Marilyn; he certainly never attempted to contact the Trumans regarding any complaint about animals at the 5151 Stutsmanville Road property (Jack Balchik dep, 63-64). Of course, in his opinion, the person who possesses, controls or cares for the animals that escaped would be responsible for same (*Id*). This is consistent with Harbor City Code Provision 60.110, which defines circumstances in which an animal can be "declared a public nuisance and the owner shall be subject to penalties provided for violation of the other provisions of this Code." Whenever an animal elopes or causes any other problem, the liability and responsibility falls on the owner of that animal. Accordingly, it makes complete sense that nobody would have bothered to contact the Trumans regarding the alleged elopement of Defendant Daniel Truman's animals.

Regardless of *why* the Trumans were not alerted of the alleged animal elopements, the evidence in this matter does not support a conclusion that the Trumans were aware of "the issue" of ongoing animal elopements. To the extent that the Michigan Court of Appeals concluded otherwise, it was a simple—but glaring—factual error.

Of course, even if the Trumans were aware of the animal elopements—which they were not—knowledge of a nuisance is irrelevant for purposes of liability. The entire knowledge issue is simply a "red herring." The Michigan Court of Appeals legally erred in finding relevance to Plaintiff's proffer of a "red herring" argument.

In *Merritt*, the Michigan Court of Appeals observed that ownership of land cannot alone lead to liability for a tort. In *Wagner*, the Michigan Court of Appeals similarly recognized that

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Daniel Truman had repaired whatever caused the few historical animal elopements. If anything, the few calls not continuing past 2000 should have led to an inference that the Trumans believed that animals were not eloping off the property. The uncontroverted lack of notice *supports* the Trumans' position.

the "possessor" of land may be deemed responsible for a nuisance that he or she knows is occurring, but does not stop. *Wagner, supra* at 163-164. While there are a string of cases suggesting that ownership of land can support a nuisance, these cases do not actually reach that conclusion. Ultimately, there is no legal basis for a conclusion that the Trumans mere ownership of the land is sufficient to deem them responsible for a nuisance occurring on the land. But the Trumans did not possess the land. Accordingly, they cannot be held responsible for a nuisance created by the possessor of the land.

Of course, the Court of Appeals did not cite any case law indicating that knowledge of a nuisance imposes liability. Instead, none of the case law cited by the Court of Appeals, such as the *Cloverleaf* decision, place any importance on knowledge. The closest that this law comes is the example reading "the defendant employed another to do work that he knew was likely to create a nuisance." *Cloverleaf, supra.* This reflects basic agency principles—if a person directs another to do something that he or she knows is likely to create a nuisance, liability may not be avoided simply because the agent is the one that created the nuisance. Nowhere does it suggest that merely knowing about another's creation of a nuisance can lead to responsibility. Thus, regardless of whether the Trumans knew about any elopements, this would not support any material nuisance element as a matter of law. Accordingly, the trial court properly granted the Trumans' motion for summary disposition, and the Michigan Court of Appeals erred in reversing that ruling.

d. Conclusion

As noted above, the trial court properly construed the facts and accurately applied the law in granting the Trumans' motion for summary disposition as to the nuisance cause of action. The

Trumans did not do anything to cause or contribute to the nuisance, which precludes tort liability. In addition, nuisance law simply does not allow ownership of property, without possession or control of the land, to satisfy a nuisance claim. It most certainly should not apply where, as here, the Trumans may be deemed to have owned the land, but it was personal property added by a third-party onto the land—which was not owned by the Trumans—that constituted the nuisance. Further, the Michigan Court of Appeals factually erred in deeming the Trumans to have known about the alleged animal elopements occurring after 2003, where the uncontroverted evidence was that the Trumans did not have such knowledge. Regardless, it was legal error for the Court of Appeals to place any reliance on knowledge, as it is not a material element. For all these reasons, the Michigan Court of Appeals erred in reversing the trial court's order granting the Trumans' motion for summary disposition. This Court should grant leave and/or peremptorily reverse the Michigan Court of Appeals' erroneous ruling.

C. If Plaintiff's Nuisance Claim Is Somehow Tenable Under Existing Nuisance Law, This Court Should Grant Leave to Clarify and/or Revise Nuisance Law to Prevent Landowners From Liability in This and Similar Cases

As noted above, the trial court properly construed the facts and accurately applied the law in granting the Trumans' motion for summary disposition as to the nuisance cause of action. Nuisance law simply cannot support a cause of action against the owner of real property where (a) the owner of the real property did not possess or control the real property; and (b) the nuisance arose out of personal property owned, possessed, and controlled by another. But if this Court somehow deems existing law to support such a recovery in nuisance, the Trumans respectfully request that this Court clarify and/or revise nuisance law to prevent landowners from being liable based on mere ownership of real property. The Trumans, therefore, respectfully

request that this Honorable Court at least grant its application for leave to appeal to allow for oral argument and briefing from interested parties with respect to nuisance law. Ultimately, the Trumans seek the reinstatement of the order granting summary disposition on the nuisance cause of action.

If mere ownership is now all that is necessary to create nuisance liability, there are numerous situations where innocent property owners will be held responsible for the actions of others, over whom they have no control. This is particularly true where the nuisance is not caused by the real property, but is instead caused by personal property added by someone other than the property owner.

If the Michigan Court of Appeals' interpretation of nuisance law is correct, every landlord and land contract vendor in Michigan is now subject to potential liability for a nuisance created by a tenant or land contract vendee. It will not matter whether the tenant or land contract vendee is solely responsible for creating the nuisance by his or her personal property. After all, in the instant matter, a horse owned by Defendant Daniel Truman was the nuisance. If every landlord is subject to liability under such circumstances, the obvious result will be a decline in landlords willing to purchase income property.

In addition to landlords, there are property owners who allow family members to stay in property for free or at low cost. As the Michigan economy struggles, the generosity of friends and family is something that should be rewarded. If nuisance liability can arise out of the personal property added to the real property by a friend or family member, there will be a disincentive for property owners to resort to assist others.

Further, the Michigan Court of Appeals' overly broad analysis of nuisance law fails to appreciate exactly what the land owner is supposed to do when personal property causes a

nuisance. Apparently, the Michigan Court of Appeals would require a real property owner to conduct daily inspections of the property to determine whether there is a risk of personal property causing a nuisance. Or perhaps the Michigan Court of Appeals would require a real property owner to evict a tenant with personal property that could cause a nuisance. Or perhaps the Michigan Court of Appeals would deem it negligence to rent real property to any animal owner, as the potential for escape will always be there. These are the problems that arise when a tort is converted to strict liability. And the Trumans respectfully contend that Michigan property values are already suffering—there is no need to provide another, new reason for property ownership to be devalued.

And, here, the Michigan Court of Appeals construed nuisance law as if it were a strict liability claim. Again, as set forth above, the facts demonstrate that the Trumans did not have knowledge of any of the animal elopements between 2001 and the 2010 incident. Further, even the alleged incidents that occurred in between those dates did not involve any animal escaping from the corral where the horse escaped from in this incident. Such a strict liability action is contrary to the principles espoused in *Merritt*.[7]

The Trumans respectfully contend that nuisance law should not be a strict liability tort. Instead, nuisance law should only impose liability on a person in a position to prevent the harm at issue. See *Merritt, supra.* Because the Michigan Court of Appeals was overbroad in construing nuisance law, especially on these facts, the Trumans respectfully request that this Honorable Court grant their application for leave to appeal to revise/clarify Michigan law

[7]To be sure, the Trumans appreciate that there are circumstances where property owners could be responsible for a nuisance instead of the party in possession and control of it. But this would involve a situation where the nuisance arose out of the real property itself, rather than personal property added to the real property by the person in possession and control of both. This would remain faithful to general tort law—imposing liability only on those in a position to prevent harm. See *Merritt, supra.*

regarding nuisance liability. Ultimately, the Trumans respectfully request that this Court reverse the Michigan Court of Appeals' erroneous decision reversing the trial court's dismissal of Plaintiff's nuisance cause of action.

II. THIS COURT SHOULD EITHER PEREMPTORILY REVERSE OR GRANT THE TRUMANS' APPLICATION FOR LEAVE TO APPEAL BASED ON NUISANCE, AS THE ISSUES RAISED HEREIN ARE OF SIGNIFICANT IMPORTANCE TO MICHIGAN JURISPRUDENCE AND/OR BECAUSE THE LOWER COURTS HAVE COMMITTED CLEAR ERROR CAUSING MANIFEST INJUSTICE.

Although the Trumans are seeking this Court's intervention, they acknowledge that the majority of the Court of Appeals' decision was accurate and proper. The Trumans limit their application for leave to appeal to the nuisance cause of action. The Trumans respectfully contend that this Court should either grant leave to appeal or peremptorily reverse on this one very important issue.

The Trumans are mindful that this Court only grants leave in select cases. However, the Trumans' application for leave to appeal involves issues of significant importance to Michigan jurisprudence. Every Michigan resident and entity is subject to potential liability for nuisance. Even worse, the Michigan Court of Appeals has construed nuisance law in a manner that exposes every property owner to nuisance liability for a nuisance created by another. Every landlord will be subject to potential nuisance liability for a nuisance created by the personal property of a tenant. Certainly, every landlord in Michigan will have an interest in the subject matter of this litigation. Similarly, every landowner who allows a friend or family member residence at a property will be similarly interested.

Moreover, it is beyond reasonable dispute that this area of law is apparently unsettled. The Michigan Court of Appeals' recitation of the factors that give rise to liability deviates from

the actual cases. In other words, there are cases that suggest mere ownership can give rise to liability, even though none of the cases actually reach that result. While it is likely that "ownership" was referenced because most property owners are the ones in possession and control of the property, this tendency should not lead to liability in the absence of possession and control. This issue needs to be clarified and/or revised by this Court. The Trumans respectfully requests that this Honorable Court conclude that intervening is appropriate because this area of law is not entirely settled and continues to be of jurisprudential importance within the State of Michigan. MCL 7.302(B)(3).

Alternatively, the Trumans observe that the Michigan Court of Appeals clearly erred in ruling that the Trumans could be deemed liable for a nuisance created exclusively by Defendant Daniel Truman. As noted above, the Trumans did not know about any of the 30 animal elopements alleged to have occurred near the property between 2001 and the incident. The Michigan Court of Appeals simply missed or ignored this important fact. Regardless, knowledge is not a substitute for any of the actual factors that give rise to liability, such as creating the nuisance or being in possession/control of a property without preventing a nuisance. As such, this Court intervention is appropriate pursuant to MCL 7.302(B)(5).

Moreover, the Trumans respectfully contend that the Court of Appeals' failure to apply *Wagner* to this matter was legal error. As a published decision released after November 1, 1990, the *Wagner* decision was controlling pursuant to MCR 7.215. Accordingly, this failure to follow Wagner further triggers this Court's intervention under MCR 7.302(B)(5).

For all these reasons, whether based on MCR 7.302(B)(3) or MCR 7.302(B)(5), the Trumans respectfully request that this Honorable Court either peremptorily reverse or grant their

application for leave to appeal and reverse that part of the Michigan Court of Appeals decision reversing the trial court's dismissal of Plaintiff's nuisance cause of action.

III. ALTERNATIVELY, THIS COURT SHOULD EITHER PEREMPTORILY REVERSE OR GRANT THE TRUMANS' APPLICATION FOR LEAVE TO APPEAL BECAUSE THE PLAINTIFF'S VOLUNTARY DECISION TO TAKE A DEFAULT JUDGMENT AGAINST DEFENDANT DANIEL TRUMAN RENDERS THE APPEAL MOOT.

As set forth in Issues I and II above, there are ample factual and legal reasons why the trial court properly granted the Trumans' motion for summary disposition with respect to the nuisance cause of action. In addition, or alternatively, there are procedural reasons why the Michigan Court of Appeals should have affirmed, rather than reversed, the trial court's dismissal of the nuisance cause of action. Specifically, the trial court granted Plaintiff's request for a sum certain default judgment against Defendant Daniel Truman. Under Michigan law, as recognized by multiple Michigan Court of Appeals unpublished decisions, a party may not take a judgment against one party and then seek to later apportion fault to another party. While there may have been a historical rule that a party was allowed multiple judgments, so long as it obtained only one satisfaction, Michigan tort reform requires one judgment to account for the liability of all potentially liable parties. Because Plaintiff took a default judgment against Defendant Daniel Truman, rather than waiting for the liability issues against the Trumans to be fully resolved, Plaintiff may not obtain a subsequent judgment against the Trumans. Accordingly, the Michigan Court of Appeals erred in reaching any of the substantive issues in this case. Consequently, this Court should reverse the Michigan Court of Appeals' decision with respect to the nuisance cause of action.

As an initial matter, it was Plaintiff that filed a motion seeking a default judgment against Defendant Daniel Truman. This is not a circumstance where the trial court somehow sua sponte

converted a request for a default into a default judgment. Instead, Plaintiff specifically requested entry of a default judgment against Defendant Daniel Truman.

Indeed, Plaintiff presented proofs as to the damages sustained as a result of the death of Terri Sholberg by way of an evidentiary hearing to enter judgment against the defaulted Defendant Daniel Truman. The claims against Defendant Daniel Truman arose out of the same incident as the claims against the Trumans. The trial court heard the testimony of Plaintiff Diane Sholberg, the mother of the deceased (see hearing transcript, Appendix C). Plaintiff placed a value on her daughter's life at "five to ten million" dollars (Appendix V, 14). Plaintiff's counsel then requested that the trial court award a judgment against Daniel Truman "in the amounts requested by Ms. Sholberg" (*Id.* at 20). While Daniel Truman indicated he thought the $5,000,000.00 figure was "a little bit much," he presented no proofs or argument to undercut this figure (*Id.* at 21). Plaintiff, via counsel, provided some (albeit minimal) argument regarding an entitlement to a $5,000,000 damage award (*Id.* at 21). The trial court ruled from the bench that Plaintiff's wrongful death damages were comprised of her de minimis financial contributions and "substantial" loss of society and companionship damages (*Id.* at 22). The court ultimately entered judgment against Daniel Truman in the full requested amount of $5,000,000.00 comprising the total amount of damages resulting from Terri Sholberg's death for this incident (*Id.* at 22-23; see also Appendix W).

It is well established that this Court may affirm where the trial court reaches the "right result" for the "wrong reason." *FACE Trading, Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 678; 717 NW2d 377 (2006). Here, Plaintiff's appeal was rendered moot by her acceptance of a default judgment against Defendant Daniel Truman. While a plaintiff may pursue separate judgments against defendants that are *jointly and severally* liable for her

damages, a plaintiff is entitled to only a single recovery for her damages against defendants that are only *severally* liable.

Indeed, in 1995, the Michigan Legislature eliminated the common-law doctrine of joint and several liability and adopted a several liability rule designed to ensure that each tort defendant is only held legally responsible for his own percentage of fault in contributing to the plaintiff's damages. MCL 600.2956, 600.2957 and 600.6304. See also MCR 2.112(K). "Under the statutory several liability system, defendants now are only accountable for damages in proportion to their percentage of fault." *Smiley v Corrigan,* 248 Mich App 51, 52 (2002). This system allocates fault to "each person, regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1). The trier of fact is tasked with the duty of assessing liability to each person who may have owed a duty to the plaintiff in "direct proportion to the person's percentage of fault." *Id.* See also *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW 2d 911 (2009). The trier of fact is similarly charged with determining the total amount of the plaintiff's damages. MCL 600.6304(1)(a).

Case law applying the aforementioned statutory scheme is clear that a judgment or default judgment against one defendant for all damages arising out of an incident extinguishes the claims as to other defendants. In *K-Mart Corp v Logan*, unpublished per curiam of the Court of Appeals (Docket No. 232393, issued July 10, 1993) (Attachment 4), the Michigan Court of Appeals considered this issue in the context of an ordinary judgment. That matter arose from Plaintiff K-Mart's employment of Michael Garzoni, a real estate attorney. Garzoni was involved in embezzling K-Mart's funds through fictitious real estate brokers. He was arrested and criminally prosecuted. K-Mart then brought suit against Garzoni and his alleged co-conspirators who apparently assisted Garzoni in laundering embezzled funds. K-Mart obtained summary

disposition as to the claims against Garzoni and reduced this to a judgment in the full amount of the damages sustained. *Id.* at 9-10. The Michigan Court of Appeals gave ample discussion to whether the tort reform statutes apply to abolish joint and several liability in all tort actions, or only specifically enumerated ones. Ultimately the Michigan Court of Appeals resolved the matter in favor of a broad abolishment of joint and several liability in all tort actions. As liability was several only, the Court ruled that the remaining defendants could not be liable:

> Because Plaintiff has already received a judgment against Michael Garzoni assessing all liability to him for plaintiff's damages, there is no liability to be apportioned among defendants; therefore, this case must be dismissed. (*Id.* at 9).

Again, with several liability, a conclusion that a party is responsible (i.e. fault is allocated) for a judgment sets the total damages that the plaintiff is entitled to claim, as well as the fault apportionment.

Even where a plaintiff takes a default judgment in the full amount of her damages, her claims against the remaining tortfeasors are extinguished. In *Stanke v Stanke*, unpublished decision per curiam opinion of the Court of Appeals (Docket No. 263446, issued January 24, 2008)(Attachment 4), the Court affirmed the trial court's grant of summary disposition that Plaintiff had allocated all of its damages to a single defendant and therefore had no remaining fault to apportion to the remaining defendant. *Stanke* has a relatively complex factual history. Jacob Stanke was a minor with a personal injury claim. *Id.* at *2. A law firm was retained and the matter proceeded to litigation. *Id.* His mother Linda Stanke was appointed his next friend in the litigation. *Id.* The matter settled and Linda Stanke was appointed as the conservator of a trust containing the settlement proceeds. *Id.* The bank which held the trust, Isabella Bank and Trust brought an action as next friend of Jacob Stanke against Linda Stanke alleging she mismanaged trust assets and against the defendant law firm alleging that it had committed legal

malpractice by drafting trust documents which allowed Linda Stanke to wrongfully deplete the trust. *Id.* The bank obtained a default judgment against Linda Stanke for the full amount of damages allegedly wrongfully depleted. *Id.* The defendant law firm brought multiple motions for summary disposition, including one which argued that the Plaintiff allocated all of the fault for Stanke's depletion of the trust funds. *Id.* The trial court granted this motion. *Id.* at *3.

The Michigan Court of Appeals affirmed. See *id.* Noting that the tort reform statutes require that the fact finder determine the total amount of the plaintiff's damages and the percentage of fault of each contributing tortfeasor, unless otherwise agreed and that there had been no objections to an allocation of all damages to the defendant, the Michigan Court of Appeals agreed that dismissal was appropriate: "Plaintiff affirmatively requested that the court enter judgment against Stanke for the full amount alleged in its complaint. When the trial court did so, there remained no more fault to be apportioned to the defendant." *Id.* at *6.

In addition, the Michigan Court of Appeals just issued another opinion reaching the same exact result. In *Arnold v American Investors Life Insurance Company*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket Nos. 293429 & 293431, issued February 19, 2013 (Attachment 4), the Michigan Court of Appeals again ruled that a default judgment against one defendant precludes any liability against a co-defendant. In these cases, the plaintiffs took default judgments representing their damages for an investment fraud case. The trial court dismissed all causes of action against other parties because MCL 600.6304(1) requires an allocation of fault only if the parties do not agree as to the allocation. In the context of a default judgment, "it was implicitly agreed by the parties that 100 percent of the fault would be allocated to Ruttenberg, thereby waiving the requirement that the trial court formally allocate fault. See MCL 600.6304(1)." *Id.* at *6. Accordingly, the Court of Appeals declined to consider any of the

plaintiffs' substantive arguments, ruling that the non-defaulted defendants were properly dismissed. *Id.* at 7.

As in both *Stanke* and *Arnold*, the instant matter involves a situation where Plaintiff pursued a default judgment against one defendant. Under Michigan's tort reform statutory scheme, the default judgment represents an allocation of 100 percent of the fault to Defendant Daniel Truman. It is an implicit agreement between the parties as to the allocation of fault. Moreover, unlike *Arnold*, Plaintiff pursued entry of this default judgment after the Trumans were dismissed. Thus, Plaintiff was fully aware that this default judgment would be all that would be obtained. This is unlike *Arnold*, where the plaintiffs obtained the default judgment during trial and may have believed that further damages awards were imminent.

In refusing to apply *Stanke*, the Michigan Court of Appeals accepted Plaintiff's contention that the trial court did not award Plaintiff all of the damages she requested. The basis for this is Plaintiff's testimony that the loss of consortium damages should be "five to ten million" (Appendix V, 14). The trial court inquired of Plaintiff's counsel what support there was for "5 million" in damages, to which the only response was that there was a death (Appendix V, 21). Defendant Daniel Truman did not contest such an award (Appendix V, 21). Regardless of all that, the trial court expressly found that Plaintiff's damages were $5,000,000 for this incident (Appendix V, 23). When questioned, Plaintiff even agreed that the $5,000,000 was a net figure, without the addition of any interest (Appendix V, 23). As in *Arnold*, Plaintiff rather plainly acquiesced to a judgment for $5,000,000 against Defendant Daniel Truman for this incident. As in *Arnold*, Plaintiff may not now claim that there are additional damages arising out of this incident that can be apportioned to a non-defaulted defendant.

Plaintiff certainly did not claim that there were other damages arising out of this incident that were not being sought against Defendant Daniel Truman. At no time did Plaintiff reserve the right to claim that there are other damages for which the Trumans could be deemed liable. Plaintiff certainly did not appeal the trial court's conclusion regarding damages. By not waiting until the issues against the Trumans were resolved, Plaintiff acquiesced to a statutory scheme conclusion that Defendant Daniel Truman was 100% responsible for all damages arising out of the incident--$5,000,000. The claims against the Trumans were extinguished due to 0% fault.

And, frankly, Plaintiff's suggestion that there are other damages is unfounded. The sole "evidence" is an unsupported claim that of "5 to 10 million." These numbers are just pulled out of thin air.

Even worse, it is absolutely unclear how any court could implement a default judgment for a sum certain with a trial under the statutory scheme. The trial court has existing findings that Plaintiff suffered $5,000,000 for this incident and Defendant Daniel Truman is 100% responsible for same. Plaintiff did not appeal the damages ruling of $5,000,000. If these are the damages, Defendant Daniel Truman is 100% responsible for same. If these are not the damages, then what are they? Will the jury be instructed to consider the issue anew? If the jury finds that damages are $100,000, will that mean that there is no responsibility for the Trumans because Defendant Daniel Truman's several liability extends to the first $5,000,000? In other words, will the jury be forced to find damages in excess of $5,000,000 before even considering the fault of the Trumans?

Of course, it would be unfairly prejudicial to inform the jury of the $5,000,000 award against Defendant Daniel Truman. At the same time, it would be equally unfair to not apportion fault as to Defendant Daniel Truman—who no reasonable trier of fact should conclude is

anything other than 100% at fault (save for comparative fault). If the jury finds Defendant Daniel Truman to be 90% at fault, does this invalidate the default judgment against him? Similarly, if the jury finds Plaintiff to be 55% comparatively at fault, does this extinguish the default judgment entirely, as it is exclusively non-economic damages? It is questions like these that underlie the Michigan Court of Appeals' recognition in the three cases cited above that a judgment (default or otherwise) against one defendant that is severally liable for the damages for one incident ends the analysis entirely. As in *Stanke, K-Mart,* and *Arnold*, the only reasonable and proper conclusion is that Plaintiff's claims against the Trumans must be rendered moot.

The Trumans do not seek the creation of new law. Rather, the Trumans merely seek the proper allocation of the statutory scheme. This statutory scheme has been properly applied to defendants in three prior cases, but the Trumans have been singled out to not have the statutory scheme apply to them. The Court of Appeals erred in refusing to apply the logic in these cases, albeit unpublished cases, on this very issue. It remains further perplexing that none of the Court of Appeals decisions construing this statutory scheme have been published. This is all the more reason for this Court to grant leave and/or peremptorily reverse pursuant to MCR 7.302(B)(3)(issue of significant legal importance) and/or MCR 7.302(B)(5)(decision is clearly erroneous and/or conflicting with other Court of Appeals' decisions). Accordingly, the Trumans respectfully request that this Honorable Court either peremptorily reverse or grant their application for leave to appeal and reverse that part of the Michigan Court of Appeals decision refusing to recognize that Plaintiff's appeal was moot.

CONCLUSION AND REQUEST FOR RELIEF

For all of the reasons set forth above, the Trumans respectfully request that this Honorable Court either grant Defendants' application for leave to appeal pursuant to either MCR 7.302(B)(3) and/or MCR 7.302(B)(5), or peremptorily reverse the Michigan Court of Appeals' decision remanding this matter to the trial court for further proceedings with respect to the nuisance cause of action.

Respectfully submitted,

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